PREME COURT, U. S.

MAY 23 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 122

BETTY GANNETT TORMEY,
Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IMMIGRATION & NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Betty Gannett Tormey, petitions that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit dismissing for want of jurisdiction a petition for review of an order of the Board of Immigration Appeals denying petitioner's motion for reconsideration of a final order for her deportation.

OPINION BELOW

The Court of Appeals wrote no opinion. The opinion of the Board of Immigration Appeals denying petitioner's motion for reconsideration (R. 30)[1] appears in Appendix B, *infra*.

JURISDICTION

The order below (Appendix A, *infra*; R. 43) is dated and was entered on April 29, 1968. Jurisdiction is conferred on the Court by 28 U.S.C. 2350, made applicable to this proceeding by section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a).

QUESTIONS PRESENTED

1. In a review proceeding under section 106 of the Immigration and Nationality Act, initiated by a timely petition for review of an order of the Board of Immigration Appeals denying an alien's motion for reconsideration of a final order for her deportation, whether the reviewing court lacks jurisdiction to pass upon the constitutionality of the statute under which the alien was ordered deported because more than six months elapsed between the entry of the deportation order and the filing of the petition for review.

2. If the foregoing question is answered in the negative, whether section 241(a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(6)(C)(i)), which provides for the deportation of aliens on account of membership in the Communist Party of the United States, is unconstitutional on its face in the light of recent decisions of the Court, and whether *Galvan v. Press*, 347 U.S. 522, should therefore be overruled.

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[1] R. designates the record of proceedings in the court below, and is referred to by page number. A.R. designates the administrative record, and is referred to by document number, followed where appropriate by the page number of the cited document.

STATUTES AND REGULATION INVOLVED

Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a), provides in pertinent part as follows:

> (a) The procedure prescribed by, and all the provisions of sections 1031-1042 of Title 5 [now sections 2341-2351 of Title 28], shall apply to and be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this Title or comparable provisions of any prior Act, except that—
>
> (1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is later.

Section 241(a)(6)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(6)(C)(i), provides as follows:

> (a) Any alien in the United States (including an an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (6) is or at any time has been, after entry, a member of any of the following classes of aliens:
>
> * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States
>
> * * *

8 C.F.R. § 3.2 provides in pertinent part as follows:

> The Board [of Immigration Appeals] may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by any party affected by the decision, shall be only upon written motion to the Board. * * * A motion to reopen or a motion to

reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. * * *

STATEMENT OF THE CASE

Petitioner, a native of Poland, was admitted to the United States in 1914, at the age of eight, and has resided here ever since (A.R. 11, p. 2).

On October 15, 1951, she was ordered deported pursuant to what is now section 241(a)(6)(C)(i) of the Immigration and Nationality Act (the Act) as an alien who was, after entry, a member of the Communist Party of the United States. The order became final on October 31, 1952 when it was sustained by the Board of Immigration Appeals (the Board). (A.R. 11.)

On July 19, 1967, petitioner filed with the Board a motion for reconsideration of its 1952 order on the ground that recent decisions of the Court have established that section 241(a)(6)(C)(i) is unconstitutional and have, in effect, overruled *Galvan v. Press*, 347 U.S. 522, sustaining the constitutionality of that section (A.R. 10). The motion was made pursuant to 8 C.F.R. 3.2 which permits motions for reconsideration to be filed at any time so long as the alien has not departed the United States.[2]

On October 9, 1967, the Board denied petitioner's motion on the ground that, "It is not within the jurisdiction of this Board or the special inquiry officer to pass upon the constitutionality of a statute which we administer" (Appendix B, *infra*, R. 31). The Board, *sua sponte*, also reexamined the evidence and concluded (*ibid.*) that, "it is clear from

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[2]The motion alleged that petitioner has not departed (A.R. 10, p. 1). The fact is that because of the refusal of Poland and other countries to receive petitioner, the Service has been unable to effect her deportation.

the record that the respondent's membership in the Communist Party was not a nominal one."[3]

On November 22, 1967, petitioner filed a petition for review by the court below, pursuant to section 106 of the Act, of the Board's order of October 9, 1967, denying her motion for reconsideration. The petition, like the motion, asserted as grounds for relief the unconstitutionality of the statute under which petitioner was ordered deported (R. 28).

On April 29, 1967, on motion of the Service (R. 32), the court below summarily dismissed the petition for review "for lack of jurisdiction" (Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT

Petitioner submits that certiorari should be granted to review both the decision below finding lack of jurisdiction, which is in conflict with applicable decisions of this Court, and the important constitutional questions which the court below did not reach.

I. Jurisdiction

The decision below dismissing the petition for review for lack of jurisdiction is contrary to *Giova v. Rosenberg*, 379 U.S. 18, and *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276.

Giova held that an order of the Board denying a motion to reopen or reconsider a final deportation order is reviewable under section 106(a) of the Act by a petition for review filed within six months from the date of the denial of the motion. The Service contended below, however, that since petitioner filed her petition for review more than

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[3] In an affidavit filed in the court below, petitioner disclaimed any contention that the evidence was insufficient to satisfy the statute and acknowledged her active membership in the Communist Party both before and since the issuance of the deportation order (R. 40-41).

six months after entry of the order for her deportation, the current validity of that order is not reviewable. All that is open to review, according to the Service, is the correctness of the Board's finding, in denying the motion for reconsideration, that it lacks jurisdiction to pass upon the constitutionality of a statute that it administers (R. 34-35).

The Court rejected this argument when advanced by the Service in *Woodby, supra.* As appears from the opinion of the Court of Appeals in that case, 370 F.2d 989, the alien, who had not sought judicial review of the order for her deportation, moved for administrative reconsideration on the ground that the evidence as to deportability was insufficient. Within six months after the denial of that motion, but more than six months after the deportation order, she petitioned for judicial review. The Service contended, as it did here, that the lapse of more than six months after entry of the deportation order precluded consideration of the order's validity, and limited review to the Board's "discretionary denial of the motion to reconsider" (370 F.2d 992). The Court of Appeals (*ibid.*) found it unnecessary to pass upon this contention inasmuch as it held the evidence sufficient to support the underlying deportation order.

This Court reversed, enunciating a strict standard for proof of deportability which had not been applied below. The majority opinion does not mention the jurisdictional question, evidently—as appears from the dissenting opinion (at 291 and n. 2)—because the Court deemed the issue settled by *Giova.*

Under *Woodby*, petitioner could have secured judicial review of the validity of the 1952 order for her deportation had her motion for reconsideration been grounded on failure of the evidence to satisfy the strict standard of proof which the Court announced in that case. Plainly, therefore, she is entitled to judicial review of the order's validity on the more fundamental ground that the statute which authorized it fails to measure up to constitutional standard enunciated in other recent decisions of the Court.

The effect of *Woodby* and *Giova* is simply to apply to deportation proceedings the uniform rule that where a motion for reconsideration or rehearing of an administrative order has been timely filed under the rules of the agency, the statutory period within which to petition for judicial review of the underlying order runs, not from the date of its entry, but from the date of the denial of the motion. *E.g., Robert Louis Stevenson Apts., Inc. v. CIR,* 337 F.2d 681 (Tax Court); *Montship Lines Ltd. v. Fed. Maritime Board,* 295 F.2d 147, 151; *Samuel Franklin & Co. v. SEC,* 290 F.2d 719, 720-25; *Albertson v. FCC,* 182 F.2d 397. The same principle governs the timeliness of appeals and petitions for certiorari to this Court. *United States v. Healy,* 376 U.S. 75, 77-80.

Other agencies and the courts have adopted rules of practice establishing time-bars on motions for rehearing or reconsideration. *E.g.,* Tax Court Rule 19(e) and (f); SEC Rule 21(e); FCC rule, 47 C.F.R. 1.106; Second Circuit Rule 25. The Attorney General, for whatever reason, has not seen fit to follow suit in regulations applicable to the Service. 8 C.F.R. 3.2, 3.8, 242.22. Under these regulations, a motion to reconsider is therefore available to an alien, so long as he does not depart the country,[4] as a means of securing judicial review of the order for his deportation. "We see nothing anomalous about the fact that a change in the administrative regulations may effectively broaden or narrow the scope of review available in the Court of Appeals." *Foti v. Immigration & Naturalization Service,* 375 U.S. 217, 229-30.

The effect of the decision below is to bar deportees in petitioner's situation from securing judicial consideration of the current validity of the orders for their deportation. Section 106 makes review by petition to the Court of Ap-

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[4] The regulations preclude motions for reconsideration after departure, and section 106(c) places a similar limitation on petitions for review.

peals "the sole and exclusive procedure" for the judicial review of a deportation order against an alien who is not in custody under the order.[5]

Plaintiff is not in, and cannot be taken into, custody under the 1952 order. For the authority of the Attorney General to detain her expired six months after the order was entered. Section 242(c) of the Act. She is, however, under onerous conditions of "supervision"—tantamount to parole—by the Attorney General pursuant to section 242(d),[6] and she may yet be deported after a lifetime in this country (n. 2, *supra*).

Petitioner's contention that the statute under which these hardships have been imposed is invalid under current standards of constitutionality is substantial (point II, *infra*). The decision below foreclosing judicial consideration of that contention is therefore not only in conflict with the interpretation of section 106 in *Giova* and *Woodby*, but flouts the principle that deportation statutes should be construed "generously to the alien." *Haw Tan v. Phelan*, 333 U.S. 6, 10, quoted in *Costello v. Immigration & Naturalization*, 376 U.S. 120, 128.

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[5] Aliens in custody may proceed by habeas corpus. Section 106(a)(9).

[6] Petitioner's current conditions of supervision, among other things, prohibit travel outside of New York State for more than 48 hours without advance notice to the Service of her itinerary, and require her to report in person at the office of the Service four times a year. Petitioner and others have instituted proceedings to enjoin enforcement of these requirements. *Dymytryshyn v. Esperdy*, No. 66, Civ. 2375, S.D.N.Y. All parties to that action agree that, because of section 106, the validity of the underlying deportation orders may not be litigated there.

II. Constitutionality

The immediate constitutional question which this case presents is whether the 1954 decision in *Galvan v. Press, supra,* sustaining section 241(a)(6)(C)(i) (the Statute) has continuing authority in the light of subsequent decisions rejecting the premises on which it was based. Underlying this, as we show below, is the fundamental question whether statutes for the deportation of resident aliens are to continue to enjoy the exemption granted them by *Galvan* from the constitutional limitations on the legislative power guaranteed by substantive due process, the First Amendment, and the prohibition against bills of attainder and *ex post facto* laws.

The fact that the case was disposed of below on the motion to dismiss is no bar to decision of the constitutional questions here. *Kendall v. Ewart*, 259 U.S. 139. See also, *Cole v. Ralph*, 252 U.S. 286, 290; *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 567-68; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214; *Ecker v. Western Pacific Ry. Corp.*, 318 U.S. 448, 489. Indeed, the Court has upon occasion decided an important constitutional question which was not even raised, let alone considered, below. *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-37 (overruling *Ex parte Bakelite Corp.*, 279 U.S. 438, and *Williams v. United States*, 289 U.S. 553); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 466.

There are compelling reasons for including the constitutional question in the grant of certiorari here. If the Court rules with petitioner on the jurisdictional question, it would serve no conceivable purpose to remand the case for consideration of the merits. At issue is the constitutionality of the Statute on its face, unincumbered by any question of fact which, if present, might usefully be resolved below. Moreover, the court below would doubtless deem itself bound by *Galvan* and thus impotent to take a fresh look at the constitutional issues which, petitioner urges, require

reexamination. Accordingly, a remand for consideration of these issues would be a futility.[7]

We turn therefore to a review of *Galvan* and to the later decisions which have eroded its authority.

A. *Galvin* reviewed.

Galvin first addressed itself to a question of statutory construction, and held (at 528) that the Statute applies to all members of the Communist Party, irrespective of their lack of knowledge of unlawful organizational purposes and of an intent to further such purposes.[8]

The Court (Justices Black and Douglas dissenting) went on to sustain the Statute as applied even to an alien whose membership had terminated prior to its enactment.[9] The opinion did so without mentioning the First Amendment and bill of attainder issues which the Statute plainly presents. And it avoided plenary consideration of challenges under the due process and *ex post facto* clauses, stating (at 530-31) that while much could be said in their favor, "were we writing on a clean slate," both were foreclosed by prior decisions. The opinion continued (at 531, citations and ftn. omitted):

> "As to the extent of the power of Congress under review, there is not merely 'a page of history,' but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive

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[7]It was perhaps recognition of this fact that influenced the court below in granting the motion to dismiss without awaiting argument on the merits.

[8]In this respect the decision accords with *United States v. Robel*, 389 U.S. 258, 262, and *Aptheker v. Secretary of State*, 378 U.S. 500, 515.

[9]Petitioner's membership commenced before enactment of the Statute and has continued ever since (R. 41). Hence her case presents no question under the *ex post facto* clause.

> Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this Court that it has no application to deportation."[10]

The Court has had no previous occasion to reexamine the result reached in *Galvan*.[11] But later related decisions have invalidated the conclusion that the Statute is constitutional. We show in what follows that this has been the case with respect to the due process issue which the opinion sidestepped and the bill of attainder and First Amendment issues which it ignored.

B. Substantive due process

Under *Galvan*, the Court lacks authority to invalidate a law for the deportation of resident aliens, even though drawn along blatantly racist lines.[12] This view of the limitations on the judicial power is unacceptable under contemporary constituional standards for at least two reasons:

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[10]The reasoning behind this "unbroken rule," as appears from the preceding paragraph of the opinion, was that deportation does not constitute punishment.

[11]The constitutional questions were avoided in *Rowoldt v. Perfetto*, 355 U.S. 115, by holding the evidence insufficient to establish that the alien's membership was "meaningful." And consideration of these questions was again made unnecessary in *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, by the holding (at 479-80) that evidence of "dues paying membership and sometime attendance at Party meetings" is not enough to satisfy the *Rowoldt* standard.

[12]"But whether the immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress." *Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (concurring opinion of Justice Frankfurter).

1. Assuming that the result in *Galvan* is supported by the "whole volume" of history to which it deferred,[13] its evasion of the merits of a constitutional question by an appeal to *stare decisis* has been repudiated in case after case. *E.g., Baker v. Carr*, 369 U.S. 186, overruling *Colegrove v. Green*, 328 U.S. 549; *Afroyim v. Rusk*, 387 U.S. 253, overruling *Perez v. Brownell*, 356 U.S. 44; *Malloy v. Hogan*, 378 U.S. 1, overruling *Adamson v. California*, 332 U.S. 46; *Murphy v. Waterfront Commission*, 378 U.S. 52, overruling *Knapp v. Schweitzer*, 357 U.S. 371, and *Feldman v. United States*, 322 U.S. 487; *Mapp v. Ohio*, 367 U.S. 643, overruling *Wolf v. Colorado*, 338 U.S. 25; *Camara v. Municipal Court*, 387 U.S. 523, overruling *Frank v. Maryland*, 359 U.S. 360; *Chef v. Schnackenburg*, 384 U.S. 373, overruling *Green v. United States*, 356 U.S. 165; *Keyishian v. Board of Regents*, 385 U.S. 589, overruling *Adler v. Board of Education*, 342 U.S. 485.

Indeed, *Galvan's* uncritical deference to precedent was anomalous even in its time. Only a week earlier, the Chief Justice had written for an unanimous Court that, "In approaching this problem [of racial segregation], we cannot turn the clock back to . . . 1896 when *Plessy v. Ferguson* was written." Yet a week later, the majority in *Galvan* turned the clock back to *Fong Yue Ting v. United States*, 149 U.S. 698, a Chinese Exclusion Act case of *Plessy's* vintage, for the rule which it held controlling.[14]

2. The Court has rejected the major premise of the decisions on which *Galvan* relied. The premise, as *Galvan*

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[13] But see Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien, 68 Yale L. Jour. 1578, 69 *id.* 262; Bullitt, Deportation as a Denial of Substantive Due Process, 28 Wash. L. Rev. 205; Constitutional Restraints on the Expulsion and Exclusion of Aliens, 37 Minn. L. Rev. 440 (Note); Boudin, The Settlor Within Our Gates, 26 N.Y. Univ. L. Rev. 266, 451, 634.

[14] See Justice Douglas' discussion of the case in his dissent in *Harisiades v. Shaughnessy*, *supra*, at 598-600.

explained (at 531), is that, "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government," and hence are "entrusted exclusively to Congress."

Subsequent to *Galvan*, *Baker v. Carr*, *supra*, upon re-examining the nature of "political questions," overruled *Colegrove v. Green*, *supra*, and held that a constitutional challenge to the apportionment of a state legislature is justiciable. Deportation laws are obviously not so "peculiarly concerned with the political conduct of government" as are legislative districting statutes. Contrary to *Galvan*, therefore, an attack on the Statute as a denial of substantive due process presents a justiciable question.

On the merits, the due process issue is governed by *Aptheker v. Secretary of State*, 378 U.S. 500, invalidating section 6 of the Subversive Activities Control Act under which citizens were denied passports solely on account of their membership in the Communist Party. The Court ruled (at 510) that this sanction "too broadly and indiscriminately restricts the right to travel and thereby abridges the liberty guaranteed by the Fifth Amendment." The sanction of the Statute is identically broad and indiscriminate. Consequently, if the guarantee of due process protects aliens and citizens alike, the Statute cannot stand.

C. Attainder.

While there is no mention of attainder in *Galvan*, its ruling on the *ex post facto* issue appears dispositive of attainder as well. For both questions turn on whether deportation constitutes "punishment."[15] *Galvan* acknowledged (at 531) that the consequences of deportation are "close to punishment for crime." But it adhered to what it termed (*ibid.*) "the unbroken rule of this Court" that the *ex post facto* clause "applies only to prosecutions for crime" and "has no application to deportation."

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[15] Punishment is a common ingredient of bills of attainder and *ex post facto* laws. *Cummings v. Missouri*, 4 Wall. 277, 323, 325-26.

Subsequent to *Galvan*, as we have shown, the Court has discarded this sterile reliance on *stare decisis* in its approach to constitutional questions. Furthermore, *Galvan's* conclusion that the Statute is not punitive, at least within the meaning of the prohibition against bills of attainder, is irreconcilable with *United States v. Brown*, 381 U.S. 437.

Brown involved the constitutionality of section 504 of the Landrum-Griffin Act, which prohibited members of the Communist Party from serving as officers or employees of labor unions. The Court invalidated the section as a bill of attainder, the decision turning on whether the prohibition of section 504 constituted "punishment."[16]

The Court held first (at 457-58) that the section had the retributive feature characteristic of punishment since it applied to past as well as to present membership. The Statute has the same feature. The Court went on to rest its decision on broader grounds which it summarized (at 461):

> "We do not hold today that Congress cannot weed dangerous persons out of the labor movement . . . Congress must accomplish such results by rules of general application. It cannot specify the people upon whom the sanction it prescribes is to be levied."

So, too, while Congress may weed dangerous aliens out of the country, it must do so by rules of general application, and not as in the Statute by specifying the people who are to be deported.

D. The First Amendment.

Nothing in *Galvan* indicates whether omission of any reference to the First Amendment stemmed from a belief that deportation statutes need not conform with First

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[16]The section indisputably had all of the other indicia of bills of attainder, as is the case with the Statute. See *Brown*, at 448-5[illegible]

Amendment requirements,[17] or from the conclusion that the Statute satisfies these requirements. On either ground, the decision is incompatible with later rulings of the Court.

The reasoning (*supra*) that makes petitioner's substantive due process challenge to the Statute justiciable applies with like force to the First Amendment issue.

On the merits, decisions since *Galvan* establish that the Statute violates the First Amendment for two reasons:

1. Legislation, like the Statute, which sanctions membership in the Communist Party, unaccompanied by knowledge of an unlawful organizational purpose, intent to effectuate this purpose and activity to that end, violates the First Amendment, even if it is assumed that the Party incites violent overthrow of the government. *United States v. Robel*, 389 U.S. 258; *Keyishian v. Board of Regents*, 385 U.S. 589;[18] *Elfbrandt v. Russell*, 384 U.S. 11.

2. The assumption, implicit in the Statute, that the Communist Party incites violent overthrow is without justification in fact. *Yates v. United States*, 354 U.S. 298, 329-30; *Noto v. United States*, 367 U.S. 290, 299. Moreover, the Statute's "short-cut procedure," by eliminating the opportunity for a hearing on the nature of the Party's advocacy, itself violates the First Amendment. *Speiser v. Randall*, 357 U.S. 513, 529.[19]

[17] The majority in *Harisiades v. Shaughnessy*, *supra*, was evidently divided on the question, Justice Jackson, who wrote the majority opinion, assumed (at 592) that First Amendment limitations were applicable. Justice Frankfurter, however, stated (at 597, concurring opinion) that the grounds designated by Congress for deportation are "*wholly* outside the power of this Court to control" (emphasis supplied).

[18] Overruling *Adler v. Board of Education*, *supra*, because (at 605) "constitutional doctrine which has emerged since that decision has rejected its major premise."

[19] It also violates procedural due process which, as *Galvan* acknowledges (at 531), is applicable to deportation statutes. *United States v. Carolene Products Co.*, 304 U.S. 144, 152; *Morgan v. United States*, 304 U.S. 1; *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-174, 175-79 (concurring opinions).

CONCLUSION

Certiorari should be granted to review both of the questions presented.

Respectfully submitted,

John J. Abt
299 Broadway
New York, New York 10007
Attorney for Petitioner

APPENDIX A
[Order Below]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of April, one thousand nine hundred and sixty-eight.

Betty Gannett Tormey, Petitioner

v.

Immigration and Naturalization Service, Respondent.

It is hereby ordered that the motion made herein by counsel for the respondent by notice of motion dated April 22, 1968, to dismiss the petition for review for lack of jurisdiction or, in the alternative, for a remand be and it hereby is granted, and that the petition for review be and it hereby is dismissed for lack of jurisdiction.

It is further ordered that the issuance of the mandate be and it hereby is stayed pending a petition for a writ of certiorari pursuant to and subject to the provisions of Rule 28(c) of the rules of this court.

A. Daniel Fusaro, Clerk

* * *

Before: Hon. Sterry R. Waterman,
Hon. Henry J. Friendly,
Hon. Irving R. Kaufman,
Circuit Judges

APPENDIX B

[Opinion of Board of Immigration Appeals]

CHARGES:

Order: Section 241(a)(6)(C), I&N Act (8 USC 1251(a)(6)(C))—After entry a member of the Communist Party of the United States

Lodged: None

APPLICATION: Reopen the proceeding

The respondent, a native of Poland, has been found deportable as an alien who after entry was a member of the Communist Party of the United States. A warrant for her deportation was issued on October 31, 1952 and is outstanding. Counsel moves for a reopening of the proceeding to test the constitutionality of Section 241(a)(6)(C) of the Immigration and Nationality Act. The trial attorney has submitted a brief in opposition to the motion.

It is not within the jurisdiction of this Board or the special inquiry officer to pass upon the constitutionality of a statute which we administer. Furthermore, it is clear from the record that the respondent's membership in the Communist Party of the United States was not a nominal one which would bring it within the rule set forth in *Galvan v. Press* (347 US 522) and *Rowoldt v. Perfetto* (355 US 115). The motion will be denied.

ORDER: It is ordered that the motion be and the same is hereby denied.

Chairman